

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

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|----------------------------|---|---------------------------|
| KATHY WRAY COLEMAN,        | ) | CASE NO.: 1:10 CV 1321    |
|                            | ) |                           |
| Plaintiff,                 | ) | JUDGE DONALD C. NUGENT    |
|                            | ) |                           |
| v.                         | ) | <u>MEMORANDUM OPINION</u> |
|                            | ) |                           |
| CITY OF CLEVELAND, et al., | ) |                           |
|                            | ) |                           |
| Defendants.                | ) |                           |

This matter comes before the Court upon the Report and Recommendation of Magistrate Judge Greg White. (ECF #53) In his Report and Recommendation Magistrate Judge White recommends that this action be dismissed with prejudice pursuant to Fed. R. Civ. P. 41(b) for failure to prosecute and failure to comply with court orders.

This is the second time that this Court has had to consider whether to dismiss Ms. Coleman's action for failure to prosecute. Ms. Coleman filed the instant action in May of 2010 in state court and it was removed to this Court on June 15, 2010. This Court dismissed the action on August 6, 2010 for Plaintiff's consistent failure to prosecute the case after Plaintiff failed to appear for a status conference after having been notified personally. On appeal, the Sixth Circuit determined that this Court had abused its discretion in dismissing Plaintiff's complaint with prejudice and remanded the action for further proceedings. After remand, the action was referred to Magistrate Judge White for pretrial supervision. As set forth in detail in Magistrate Judge White's Report and Recommendation, Plaintiff, acting *pro se*, has continued her former practices of ignoring Court orders and deadlines. Magistrate White notes that the Plaintiff "has repeatedly and contumaciously" failed to attend hearings set by the Court, including the Show Cause Hearing held on October 10, 2012, despite having been warned that

“[f]ailure to attend may result in sanctions which could include, in case of Plaintiff, dismissal of this action with prejudice.” Magistrate Judge White carefully analyzed and reviewed the factors set out by the Sixth Circuit in *Wu v. T.W. Wang, Inc.*, 420 F.3d 643, 643 (6th Cir. 2005) relating to when a case may be dismissed for failure to prosecute and determined that all four factors were met in this instance. “Although none of the four factors is outcome dispositive, a case is properly dismissed by the district court where there is a clear record of delay or contumacious conduct.” *Pharmacy Records v. Nassar*, 379 Fed. Appx. 522, 524 (6<sup>th</sup> Cir. 2010) (citation omitted.) “Contumacious” has been defined as “perverse in resisting authority” and “stubbornly disobedient.” *Schafer v. City of Defiance Police Dep’t*, 529 F.3d 731, 737 (6<sup>th</sup> Cir. 2008).

The Plaintiff’s actions as set forth by Magistrate White in his Report and Recommendation clearly indicate that her conduct was contumacious and willful. Further, the record shows that Defendants have been prejudiced in that Plaintiff’s behavior has completely stalled the action, causing the case to languish in the pre-discovery phase. Magistrate White explains that the Court considered less drastic sanctions than dismissal with prejudice after Plaintiff’s first and second unexcused absences, setting instead a Show Cause Hearing. Plaintiff was repeatedly warned that her failure to attend court conferences and especially the Show Cause Hearing could lead to dismissal of her action. Magistrate Judge White notes “[d]espite the Court’s best efforts to move this case forward, all efforts have been completely thwarted by Plaintiff’s dilatory tactics. The Court, therefore, harbors serious reservations whether Plaintiff has any real desire to reach a stage where this action can be addressed on its merits. While the Court has considered less drastic sanctions, the Court is left with no other viable remedy, as it has been unsuccessful in compelling Plaintiff to prosecute her case.” (ECF #53 at 7)

On November 13, 2012, Plaintiff filed a Motion to Strike Magistrate's Report and Recommendation for Dismissal with Prejudice and in the Alternative Motion for Extension to Secure Transcript to File Objections to Magistrate's Report and Motion for Removal of Magistrate and Renewed Motion to Dismiss without prejudice. (ECF #58).<sup>1</sup> The largely incoherent filing asserts that the Report and Recommendation should be stricken as false and defamatory and because Magistrate White is prejudiced and biased. There is no support for any of these allegations.

Further, Plaintiff's alternative motion for an extension of time to file objections to the Report and Recommendation is out of rule, as objections, or requests for extensions must be filed within 14 days of service of the Report and Recommendation. Plaintiff offers no justification for her failure to timely file a request for additional time or any reason to believe that additional time would result in an actual filing with substantive merit.

Finally, Plaintiff asks that the dismissal be without prejudice as the case was prematurely filed because the claims of malicious prosecution and abuse of process cannot accrue until the criminal case that forms the basis of the claims is terminated. However, Plaintiff states that she was acquitted of the of the criminal charges on May 9, 2009. Her lawsuit was filed after that date, thus the claims have accrued.

Finally, Defendant Cuyahoga County Deputy Sheriff Mullen moves for Amendment of the Report and Recommendation to make clear that there is not currently an outstanding warrant for Plaintiff's arrest. (ECF #54) Magistrate Judge White noted that Plaintiff previously indicated

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This Court has reviewed *de novo* those portions of the Magistrate Judge's Report and Recommendation to which objections have been made. *See* Fed. R. Civ. P. 72(b).

that she was apprehensive about appearing in Court for fear of arrest and found that Plaintiff's fear of arrest, whether real or imagined, does not excuse her failure to prosecute this action or her failure to comply with the Court's orders. The apparent misunderstanding regarding whether there was an active warrant for Plaintiff's arrest in Cleveland Municipal Court at the time of the Show Cause Hearing does not affect the analysis or outcome here.

The Magistrate's Report and Recommendation fully and correctly addresses all of the issues and factors relevant to the sanction of dismissal with prejudice for failure to prosecute. Further, the Plaintiff's Motions to Strike the Report and Recommendation, for Removal of the Magistrate, and to Dismiss without prejudice are unwarranted and are denied. Similarly, Plaintiff's Motion for additional time to file objections is out of rule and is denied. This Court, therefore, ADOPTS the Magistrate's Report and Recommendation, with the clarification that Defendants and defense Counsel were not aware of any outstanding warrant for the arrest of Plaintiff at the time of the Show Cause Hearing. For the reasons stated above, Plaintiff's Motions (ECF #58) are hereby DENIED, and this action is DISMISSED WITH PREJUDICE. IT IS SO ORDERED.

/s/Donald C. Nugent

DONALD C. NUGENT  
United States District Judge

DATED: December 3, 2012